the distributor was in serious financial trouble (WR 32a; R. 48a). A proposal was made whereby Moore would be continued as a distributor provided petitioner continued scheduled payments on its notes (R. 48a). In the ensuing months Wurlitzer assigned a team of field investigators to visit each route location of petitioner in company with Moore's collectors. It was discovered that a substantial number of the phonographs supposedly sold to petitioner could not be located or accounted for. Further investigation revealed that others had been transferred to associates or relatives of Moore. At the same time, other purchasers from the distributor began to default on their notes claiming they had never received delivery of equipment and had signed contracts and notes only as an accommodation for Moore. Some of these acts are listed as the acts of bankruptcy (R. 4a-5a, 10a-11a).

A few days prior to the filing of the bankruptcy petition, Moore furnished Wurlitzer with a list of alleged creditors of petitioner which numbered only seven (WR 31a). Although the Referee found that petitioner had fifteen creditors other than Wurlitzer, WAC and one Joseph Rae (R. 27a-28a), following the adjudication and the expiration of the six-months period during which proofs of claim could be filed, only seven countable creditors including Wurlitzer and WAC (i.e., excluding five employee wage claimants) filed proofs of claim. Four were governmental agencies (tax and compensation insurance claims) which, though requested, declined as a matter of policy to intervene as creditors in support of the involuntary petition. The other was a friend of Moore who testified as a witness for petitioner in the trial on the petition (Steno. Tr. 537 *et seq.*).

Contemporaneously with the filing of the bankruptcy petition, a receiver was appointed by the District Court to operate petitioner's route in an effort to preserve the

remaining location rights and revenue for the benefit of creditors. Moore and several of his employees were employed by the receiver on a salary basis for this purpose. In late summer 1960 the receiver discovered that while acting in this capacity Moore and his associates had secretly removed and disposed of phonograph equipment owned by petitioner and had sold through nominees practically all of petitioner's remaining route locations to third parties. The matter was presented to the United States Attorney for the Eastern District of New York and resulted in Moore's indictment for criminal violations of the Bankruptcy Act, to which he later pleaded guilty.[3] These depredations reduced the revenue of the route to nil and forced the receiver to sell at public auction the remaining physical assets for a sum under $30,000.

Subsequently, the receiver became petitioner's trustee in bankruptcy and instituted a civil action in the United States District Court for the Eastern District of New York against Moore and the others who had participated in the conspiracy to defraud the estate.[4] On October 9, 1961, at the conclusion of a lengthy trial, the District Court in that action handed down a partial decision in favor of the trustee holding that the equipment and location rights involved therein were the property of the bankrupt's estate and had been illegally transferred as part of a plan and design to discharge Moore and his other corporations from indebtedness to some of the defendants but reserving decision as to the question of which alleged participants in the

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[3] This Court on October 9, 1961 denied Moore's petition for certiorari to review decisions of the lower courts refusing him permission to withdraw his guilty plea. *Moore et al.* v. *United States*, No. 196, October Term 1961.

[4] *M. Hallsted Christ, Trustee, etc.* v. *Vending Enterprises, Inc., et al.*, Civil Action No. 60-C-1207, U.S.D.C., E.D.N.Y.

conspiracy were to be held liable in damages. An attempt was made by some defendants before trial in that action to use these bankruptcy proceedings as a vehicle for a motion to stay its prosecution pending a petition for certiorari to this Court, but the court below (Judge Friendly included) unanimously refused to stay the trustee's administration of the estate.

The case, therefore, is one in which a confessed hopelessly bankrupt corporation, no longer in business, has been in the hands of the bankruptcy court for over a year and a half. During all that time the remaining assets have been in the process of orderly administration, and it would now appear after protracted litigation that som recovery for creditors is in prospect. The case is highly unusual on its facts; the question raised is of importance only to the litigants and unlikely to recur. If the administration of the bankrupt's estate were to be halted at this juncture on the ground that one of the petitioning creditors was not qualified, it would serve only to undo the orderly administration of assets and claims for which the Bankruptcy Act was enacted and leave each creditor to his own devices—a very unsatisfactory substitute in this case.

For the reasons hereinafter stated, respondents submit that the court below was clearly right in giving Section 59b literal effect in the circumstances of this case, and that the petition offers no substantial reason to support the conclusion that the case raises "an increasingly important problem in the administration of the Bankruptcy Act" (Petition, p. 9).

REASONS FOR DENYING THE WRIT

I.

Wurlitzer and WAC were each a bona fide "creditor" as defined in the Bankruptcy Act and entitled to be counted separately as such under the plain and unambiguous language of Section 59b.

The court below correctly held that the plain language of Section 59b and the purpose of the Bankruptcy Act permitted no other conclusion than that WAC was qualified as a petitioning creditor in the circumstances of this case. In reaching that conclusion, the Court paid strict heed to canons of statutory interpretation which have become familiar through many opinions of this Court.

The first of these is the rule that there is "no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Associations*, 310 U.S. 534, 543 (1940). As this Court pointed out in that case, when the words used are sufficient in and of themselves to determine the purpose of the legislation, "we have followed their plain meaning" (*ibid.* p. 543).

This rule the court below also followed, as it was required to do because of the express definition of "creditor" in Section 1(11) which Congress itself had supplied (Petition, App. 4a). It was the absence of such a legislative definition in the Motor Carrier Act which required this Court in *American Trucking Associations, supra,* to examine legislative history to determine the intended scope of the term "employees" used in that Act (310 U.S. at pp. 545-546).

No resort to Congressional debates of long ago is necessary or warranted in this case. The definition of "Creditor"

in Section 1(11) of the Act, viz., "*anyone who owns a debt, demand, or claim* provable in bankruptcy", is, as the court below underscored, a definition "virtually all-encompassing" with regard to the scope of permissible petitioners (Petition, App. 4a). Nowhere in the Act is there the slightest suggestion that "creditor", as so defined, is to be read any differently in Section 59b than in any other provision of the Act. Nor is any indication found in the Act even remotely suggesting that a parent-subsidiary relationship between two corporate petitioning creditors, each holding concededly bona fide separate claims against the bankrupt, deprives them of their normal right to be counted separately as creditors for purposes of the "rule of three." The plain language and purpose of the Bankruptcy Act is all to the contrary, as the court below demonstrated.

This Court has indicated that provisions in the Act relating to the satisfaction of the "rule of three" are to be given effect in accordance with their plain and unambiguous language. Thus, in *Canute Steamship Co.* v. *Pittsburgh & West Virginia Coal Co.*, 263 U.S. 244 (1923), cited in the petition (p. 6), although one of the original three petitioners failed to qualify due to lack of a provable claim, the petition was still held good because "the plain provisions of §59f supplementing and modifying the provisions of 59b * * * provide[s] in unambiguous language that creditors other than the original petitioners may, 'at any time' enter their appearance and 'join in the petition.'" 263 U.S. at 248.

The court below did not blindly follow the literal words of the Act. It properly considered the Act as a whole to ensure that a literal reading would not produce absurd or unreasonable results "plainly at variance with the policy of the legislation as a whole". *Ozawa* v. *United States*, 260 U.S. 178, 194, quoted in *United States* v. *American Trucking*

Associations, supra, 310 U.S. at p. 543. The court noted that the question of corporate relationships of one kind or another between creditors and a debtor had been expressly provided for by Congress in Section 59e of the Act.

Section 59e, incidentally, was amended to provide against improper use of corporate relationships when the Bankruptcy Act was completely overhauled in 1938 by the Chandler Act. Certainly, by that time Congress was fully aware of the problems posed by the multiple corporation means of doing business. This is borne out in the House Judiciary Committee Report submitted by Representative Chandler which recommended the amendments updating the 1898 Act. There it was stated:

> "In the modernization of the statute, every provision has been gone over with a view of bringing it into accord with the best feature of present-day business and commercial practice." (H.R. Rep. No. 1409, 75th Cong., 1st Sess., p. 4 [1937].)

The same report indicates that Congress was also fully aware that the Bankruptcy Act was no longer to be regarded as merely an equilibrium of tensions between debtor and creditor.[5] In this changed context, as the court below

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5 Quoted in the House Report, with apparent approval, were the conclusions from a 1936 report to a Special Committee of the United States Senate to Investigate Receiverships and Bankruptcy Proceedings and Administration of Justice in United States Courts, as follows:

> "Insolvency legislation in the past has been concerned solely with the regulation of the barriers designed to save unfortunate bankrupts from the rapacities of their creditors, and, conversely, to protect trusting creditors from the frauds of dishonest debtors. However, changing times have brought changing practices. The merchant who bought from a trade jobber has given way to the corporate retailer which owns its own factories. The trader who borrowed from his local bank has yielded to the debtor that sells its pledges in remote lending marts. Local partners have been supplanted by Nation-wide investors.
>
> "The consequence is that what was once a simple field of legislative conflict with two readily discernible and widely separated economic forces

pointed out, "the principal Congressional fear of abuse was not that a debtor would be too easily petitioned into bankruptcy—rather that through connivance with friendly creditors the insolvent debtor might be able unfairly to hamstring one or two large creditors" (Petition, App. p. 4a).

Clearly, when Congress was completely overhauling the Bankruptcy Act in 1938, and amending Section 59e to restrict the use of corporate relationships with creditors for the purpose of preventing involuntary bankruptcy, had it intended to place a similar restriction upon the right of related corporations to be counted as creditors in support of an involuntary petition, it would surely have done so. When such additional provisions could readily have been made but were not, it is not the function of the Court to read them into the Act. "It is [the Court's] judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 575 (1952). Cf. *United States* v. *Rice*, 327 U.S. 742, 752 (1946). In this case, the court below faithfully performed that function and there is no need for this Court to exercise its jurisdiction.

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has come to be a terrain populated by numerous, shifting, and kaleidoscopic contingents. Once the lines were finely drawn, now the boundaries are vague and indistinct; once the forces were wholly economic, now they are shot with social and ethical tinges. What once was legislative ground upon which information was little needed for a determination of problems and their remedies has become sanguinary with social and economic causes and effects." (*Ibid.*, p. 48.)

II.

The requirement of good faith pervading the Bankruptcy Act and the separate entity rule precludes this case from raising an important problem in the administration of the Act.

The record is clear in this case that WAC was an independently operated subsidiary, that Wurlitzer neither abused nor disregarded that independence, and that WAC's claims were acquired in the normal course of its legitimate business (Petition, pp. 6, 8).[6] On these admitted facts, the court below was clearly correct in treating Wurlitzer and WAC as separate legal persons under the familiar rule restated by this Court in *Scheuley Distillers Corp.* v. *United States*, 326 U.S. 432, 437, quoted at page 7 of the petition. As separate legal persons in fact according to law, Wurlitzer and WAC represent sufficiently separate creditor interests in reality, not merely in form, to satisfy the plainly spelled out requirements of Section 59b.

Such a holding raises no problem of importance to the administration of the Bankruptcy Act because it is neither inconsistent with the plain language of Section 59b nor subversive of the legislative purpose of the Act. As this Court has said, "the object of bankruptcy laws is the equitable distribution of the debtor's assets amongst his creditors; * * *." *Kuehner* v. *Irving Trust Company*, 299 U.S.

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[6] In this connection it should be noted that WAC did not acquire its creditor status "solely by purchase of debt claims from Wurlitzer" (Petition, p. 8). What WAC originally purchased was third party commercial paper which became claims against petitioner by reason of defaults not within WAC's control and as a consequence of petitioner's own act of guaranty which made such obligations enforceable against it by operation of law. Petitioner also disregards WAC's independent relationship to its own creditors, the banks which supply its working capital and look to it for payment (WR 46a-47a).

445, 451 (1937). That object can only be accomplished in this unusual case by preserving, not denying jurisdiction in the Bankruptcy Court.

The suggestion that counting parent and subsidiary as separate creditors in this case may do violence to the legislative purpose expressed in Section 59b (Petition, pp. 7-8) overlooks the basic safeguard of good faith built into the Bankruptcy Act. That good faith is the touchstone by which corporate relationships are to be tested under the Act is evident from this Court's opinions in *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211 (1948) and *Taylor* v. *Standard Gas & Electric Co.*, 306 U.S. 307 (1939).

In *Comstock* a dominant parent corporation was allowed to recover its full claim from a bankrupt subsidiary in reorganization where its administration had been in good faith and the corporations were conducted as two separate entities, whereas in *Standard Gas* a parent corporation which had mismanaged its subsidiary for its own benefit had its claim subordinated to that of preferred stockholders.

The good faith rule as applied in this case and recognized by this Court provides the clear answer to the fears expressed in the petition that a significant problem of bankruptcy administration has been raised which deserves the attention of this Court. The fears expressed are founded upon imagined hypothetical situations not presented in this case. The very substitute suggested, namely, the identification of three "separate creditor interests" (Petition, p. 9), would not only read into the Act something which is not there but in the final analysis would require resort to the ultimate factual criterion of good faith.

As for the parcelling out of claims suggested in the dissenting opinion below (Petition, App. pp. 11a-12a), this Court has already taken care of the situation by Gen-

eral Order 5(2)—a rule clearly satisfied in this case and not intended to "prevent bona fide creditors from petitioning to have their debtor adjudged bankrupt" even when the separate creditors came into existence as the result of an assignment. *Reed* v. *Thornton*, 43 F.2d 813, 814 (9th Cir. 1930).

CONCLUSION

Petitioner's suggestion that the bitter Congressional debate between debtor and creditor factions preceding the Bankruptcy Act of 1898 may provide the true meaning of Section 59b is but an attempt to create doubt where there is none (Petition, p. 8). "The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.'" *Ex Parte Collett*, 337 U.S. 55, 61 (1949), quoting *Gemsco* v. *Walling*, 324 U.S. 244, 260 (1945).

The issues involved in this peculiar case are of interest only to the immediate litigants. It presents no genuinely important problem of Federal law deserving the attention of this Court. Accordingly, the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

Edward R. Neaher
25 Broadway
New York 4, N. Y.
Counsel for Respondents

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